(21)

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 1091. 130

138

GRAYBAR ELECTRIC COMPANY, INC.,

Petitioner,

—against—

NEW AMSTERDAM CASUALTY COMPANY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

G. ARTHUR BLANCHET,
OSCAR R. HOUSTON,
ARTHUR W. CLEMENT,
Counsel for Respondent.

INDEX.

PAGE

Statement 1

Facts 2

POINT I—No "conflict" or "confusion" exists between the decisions of the Tennessee Supreme Court and the New York Court of Appeals; as the New York case follows the Tennessee decision they are obviously in complete uniformity 5

POINT II—Entirely aside from its failure to sue in time, petitioner's claim was completely barred by its failure to comply with the provisions of the Tennessee statute requiring it to give notice of claim as a condition precedent to recovery on the bond 9

POINT III—The Tennessee and New York decisions in the present case are entirely consistent with their respective prior decisions and the decisions of this Court 11

Conclusion 14

TABLE OF CASES CITED:

Cass v. *Smith*, 146 Tenn. 222 10

City of Knoxville v. *Melvin F. Burgess, Inc., et al.*, —— Tenn. ——, 175 S. W. (2) 548 . . . . 4, 6, 9, 10, 11, 12

Clark Plastering Co. v. *Seaboard Surety Co.*, 259 N. Y. 424 13

John Hancock Ins. Co. v. *Yates*, 299 U. S. 178 7

Hartford Accident & Indemnity Company, et al. v. *Delta & Pine Land Co.*, 292 U. S. 143 7

Ben M. Hogan v. *Walsh & Wells*, 177 S. W. (2) 835 11

International Steel & Iron Co. v. *National Surety Co.*, 297 U. S. 657 12

PAGE

Maryland Casualty Co. v. *Clark's Creek Drainage Dist. No. 6*, 4 Tenn. Appeals Reports 380 10

Midstate Co. v. *Penna. R. Co.*, 320 U. S. 356 12

United States Fidelity & Guaranty Co. v. *Tafel Electric Co.*, 262 Ky. 792 9

Walsh & McGee Steel Co. v. *Fidelity & Deposit Company of Maryland*, 260 N. Y. 496 13

OTHER AUTHORITIES CITED:

40 U. S. C. A., §270(a), 270(b) 4

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 1091.

GRAYBAR ELECTRIC COMPANY, INC.,
Petitioner,

—against—

NEW AMSTERDAM CASUALTY COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

The opinion of the New York Court of Appeals, which this Court is asked to review, is reported in 292 N. Y. 246 and is printed as Appendix E (p. 37) of the petition.

The opinion of the Tennessee Supreme Court construing the identical bond involved in the present action is reported in 175 S. W. (2) 548, and is printed as Appendix D (p. 28) of the petition.

The construction contract and the performance bond involved in this action were executed, delivered and to be performed wholly within the State of Tennessee.

Both the New York Court of Appeals and the Tennessee Supreme Court have held in these opinions (1) that the bond here involved was given pursuant to the Tennessee statutes, (2) that the provisions of the Tennessee statutes requiring a materialman to give written notice within

ninety days and to sue within six months are to be read into the bond with the same force and effect as if specifically set forth in the bond, and (3) that where, as here, the materialman has failed to give such written notice or to begin an action within the times specified in the statutes, he cannot recover on the bond.

These decisions of the highest Courts of New York and Tennessee are in exact accord and no conflict or "confusion" arises from them.

Facts.

The action was brought by petitioner, a materialman, against respondent, a surety company, to recover upon a performance bond executed and delivered in the State of Tennessee under the following circumstances:

On February 20, 1940, the Knoxville Electric Power and Water Board of the City of Knoxville, Tennessee (hereinafter referred to as the "Board"), acting on behalf of the City of Knoxville, Tennessee, awarded a construction contract to a contractor, Melvin F. Burgess, Inc. (hereinafter referred to as "Burgess").

That contract was made at Knoxville, Tennessee, and was for the improvement of the electric distribution system of the City of Knoxville, and was to be wholly performed in the State of Tennessee (R., pp. 110; 104).

The only parties to this contract were the Knoxville Electric Power and Water Board (acting for the City of Knoxville, Tennessee), and Burgess, the contractor (R., p. 110).

While the United States loaned money to the City of Knoxville in order to assist financially the City of Knoxville in the construction of the improvement to the city's electric system, that was done under a prior separate loan contract entered into some weeks before, between the Knoxville Board and the United States Government.

The United States Government is not a party to the construction contract and assumed no liability thereunder. No relation of any sort existed between the United States and the plaintiff, a materialman.

At the time of the execution of the construction contract, Burgess, as principal, and the respondent, as surety, executed and delivered to said Board, the performance bond *required by the Tennessee statute*.

Petitioner states that this "bond was written on a form required by the Rural Electrical Administration for all work done anywhere in the U. S.", and thereby seeks to give the erroneous impression that this bond was one "required" by the Rural Electrical Administration. Such is not the fact and there is no evidence to such effect.

This bond happens to be in the same form as one that can be purchased by anyone as part of a set of forms designated "Construction Contract (General Contract) for Rural Electrification Distribution Project", but that is as far as the matter goes, because the specimen form of construction contract included in the set of papers and designated "Construction Contract (General Contract) for Rural Electrification Distribution Project" was not the contract used in the present case.

The construction contract used in the present case required that the performance bond should be "in full accordance with Statutory requirements".

The uncontradicted fact is that the construction contract executed in the present case differs materially from the said specimen form (R., pp. 124, 125).

Specifically the construction contract required that the bond be amended to conform to the local requirements "where state statutes * * * contain additional and/or conflicting provisions". *No such requirement is found in the said specimen form of construction contract* (R., p. 125).

While the construction contract, here involved, between the Board and Burgess was, as we have said, for a public work in the State of Tennessee, that work was clearly not a "public work of the United States" within the Miller

Act. 40 U. S. C. A. §270(a), 270(b). If it had been, the New York State Court would have had no jurisdiction since the Miller Act requires suit to be brought in the Federal District Court in the district in which the work was performed.

Moreover, as the decision by the Tennessee Supreme Court in the *City of Knoxville* case pointed out, it has been repeatedly held that the performance bonds of this nature are dual in nature (p. 31—Petitioner's Brief) but that this performance bond, *in so far as materialmen are concerned*, is a statutory bond.

The relevant Tennessee statutes provide:

(1) That no contract shall be let for any public work in the State of Tennessee by any City until the contractor shall first have executed a bond to the effect that he will pay for all labor and materials used by said contractor in said contract (Petitioner's Brief, Appendix B, p. 24);

(2) That if any public officer whose duty it is to let contracts shall let any contract without requiring a bond for the payment of labor and material in compliance with the provisions of the Tennessee statute, such officer shall be guilty of a misdemeanor (Petitioner's Brief, Appendix B, p. 25);

(3) That in order to obtain the benefit of such a bond, the materialman shall within ninety days after the completion of the public work give written notice setting forth a detailed statement of claim * * * either to the contractor or to the public officer who had charge of the letting of the contract (Petitioner's Brief, Appendix B, p. 25);

(4) That any materialman may bring an action on the bond for recovery in his own name (Petitioner's Brief, Appendix B, p. 26);

(5) But that such an action on the bond must be brought within six months following the completion of the public

work or the furnishing of the material (Petitioner's Brief, Appendix B, p. 26).

At the outset it should be noted that this Tennessee statute requiring such a performance bond was enacted for the benefit of materialmen and laborers, and that the statute itself imposed, *as limitations of any liability on the bond*, two conditions precedent, *i. e.*, (1) that the materialman must file written notice of claim within ninety days after the completion of the work, and (2) commence action on the bond within six months following the completion of the public work or the furnishing of the material.

Petitioner, a materialman, failed to give the written notice of claim within the ninety day period fixed by the Tennessee statute as a limitation of liability on the bond. The petitioner also failed to bring the present action within the six months period also prescribed by the Tennessee statute as a limitation for liability on the bond.

POINT I.

No "conflict" or "confusion" exists between the decisions of the Tennessee Supreme Court and the New York Court of Appeals; as the New York case follows the Tennessee decision they are obviously in complete uniformity.

Prior to the commencement by petitioner of the within action, the City of Knoxville filed a bill of interpleader in the Chancery Court in Tennessee, naming as defendants the contractor, the surety and several unpaid creditors, including the present petitioner.

Thereafter petitioner, seeking to avoid this Tennessee action in which all interested parties were named as defendants, sued in New York on the Tennessee performance bond, in this present independent action, in which it alone was plaintiff.

Both parties moved for summary judgment in the New York action. The Justice at Special Term gave the plaintiff (petitioner) summary judgment and denied defendant's motion for summary judgment. Defendant appealed to the Appellate Division which affirmed the decision of the Court below without opinion, but granted defendant's motion for leave to appeal to the Court of Appeals.

Prior to the decision by the New York Court of Appeals, the Supreme Court of Tennessee (its highest court) rendered its decision in the Tennessee action, in which the petitioner, though named as a defendant, had declined to take part.

In that case (*City of Knoxville* v. *Burgess*, Appendix D to Petitioner's Brief) the Tennessee Supreme Court ruled that the identical bond in the present case is a statutory bond, that the Tennessee statutes requiring the bond created a new liability for the benefit of materialmen, and that the Tennessee statutory provisions requiring materialmen to give written notice of claim within ninety days, and to sue within six months, are limitations on a materialman's right to recover on the bond, compliance with both of which are conditions precedent to any recovery by a materialman on the bond.

There is no mistaking the language used by the Supreme Court of Tennessee in its said decision, and it was so interpreted by the New York Court of Appeals, which said:

> "To our minds, these words mean that the provisions of the statute of Tennessee were limitations of the liability undertaken upon the bond in suit and not limitations of the rights of action thereby conferred upon laborers and materialmen. (Cf. *National Surety Co.* v. *Architectural Co.*, 226 U. S. 276; *Home Ins. Co.* v. *Dick*, 281 U. S. 397, 407; *Clark Plastering Co.* v. *Seaboard Surety Co.*, 259 N. Y. 424.)"

Recognizing its constitutional obligation, the New York Court of Appeals then said:—

> "The Tennessee statute (as so construed by the highest court of that State) must here be accorded the full faith and credit which is enjoined by the Federal Constitution in respect of the 'public acts' of a sister State. (*John Hancock Ins. Co.* v. *Yates*, 299 U. S. 178.)"

and reversed the judgment and dismissed the complaint.

The action of the New York Court of Appeals in giving in this case "full faith and credit" to the applicable Tennessee statute as construed by the Tennessee Supreme Court, decides no Federal question not heretofore determined by this Court. In fact, the New York Court of Appeals cited and followed the decision of this Court in the case of *John Hancock Ins. Co.* v. *Yates*, 299 U. S. 178, where this Court held that a Georgia Court was obligated to give full force and credit to a New York statute, as construed by the New York Court of Appeals, which made a false statement in the written application for life insurance, a material misrepresentation avoiding the policy.

In that case, the contract of insurance was made in New York and this Court said that the giving effect in Georgia to the New York statute is merely a recognition that the parties to the contract had subjected themselves to statutory conditions. (See 299 U. S. at p. 182.)

Compare *Hartford Accident & Indemnity Company, et al.* v. *Delta & Pine Land Co.*, 292 U. S. 143 (1934), where Mr. Justice Roberts, writing for this Court said, at pages 149 and 150:

> "The contract being a Tennessee contract and lawful in that state, could Mississippi, without deprivation of due process, enlarge the appellant's obligations by reason of the state's alleged interest in the transaction? We think not. Conceding that ordinarily a

> state may prohibit performance within its borders even of a contract validly made elsewhere, if the performance would violate its laws (*Home Insurance Co.* v. *Dick*, *supra*, p. 408), it may not, on grounds of policy, ignore a right which has lawfully vested elsewhere, if, as here, the interest of the forum has but slight connection with the substance of the contract obligations. Here performance at most involved only the casual payment of money in Mississippi. In such a case the question ought to be regarded as a domestic one to be settled by the law of the state where the contract was made."

No adverse public policy in New York exists in this case.

Where no question of public policy is involved, the refusal to apply the law of the place of contracting and the determination of the rights of the parties by the law of the forum is not only a passive refusal to enforce the foreign contract, but is an affirmative enforcement of an altogether different contract which had no existence under the law of the situs.

The present action arises out of business done by the petitioner in the State of Tennessee. When it did business in Tennessee, the petitioner subjected itself to the laws of Tennessee and it cannot escape the operation of the Tennessee statutes merely by crossing state lines and starting an action in the Courts of New York.

To permit one rule to be applied in Tennessee and a different rule in New York would produce the "confusion" which petitioner "fears" but which does not now exist.

On the contrary, complete uniformity will result in all the forty-eight states if, as here, the elementary principle is recognized and enforced that rights under a contract are to be determined by the law of the state wherein it was executed and to be performed and that "full faith and credit" must be given in every other state to the statutes and decisions of the courts of the state wherein the contract was made.

The effect of the New York Court of Appeals decision in the present case is merely to make certain that all creditors will receive the same uniform treatment regardless of the state wherein the action is brought, and to serve notice that no creditor can obtain preferential treatment by doing what this petitioner did, *i. e.*, refuse to participate in a local action wherein all interested persons were parties.

In addition to the New York and Tennessee decisions, the Supreme Court of Kentucky in *United States Fidelity & Guaranty Co.* v. *Tafel Electric Co.*, 262 Ky. 792 (1935), construed the identical Tennessee statute and held that the Tennessee statute requiring that action must be brought on the bond within six months, operated as a limitation of the liability on the bond. (In the *City of Knoxville* case, the Supreme Court of Tennessee quoted, with approval, from the *Tafel Electric Co.* case.)

The above quoted decisions show that the highest courts of three states—New York, Tennessee and Kentucky—which have passed on these Tennessee statutes have all reached one identical uniform result.

POINT II.

Entirely aside from its failure to sue in time, petitioner's claim was completely barred by its failure to comply with the provisions of the Tennessee statute requiring it to give notice of claim as a condition precedent to recovery on the bond.

Petitioner has avoided the issue that its claim was barred by its failure to file notice of claim as required by the Tennessee statute.

The Tennessee statute provides that in order for a materialman to obtain the benefit of the bond he shall within ninety days after the completion of the public

work give written notice setting forth a detailed statement of claim by return-receipt registered mail or by personal delivery to the contractor.

Compliance with this condition precedent is necessary to the maintenance of the action.

> *City of Knoxville* v. *Melvin F. Burgess, Inc. et al.*, —— Tenn. ——, 175 S. W. (2) 548.

In *Maryland Casualty Co.* v. *Clark's Creek Drainage Dist. No. 6*, 4 Tenn. Appeals Reports 380 (1926), the Court said, at page 389:

> "Such filing is a condition precedent to the right to maintain an action or obtain a recovery on such bond."

In *Cass* v. *Smith*, 146 Tenn. 222 (1921), the Supreme Court of Tennessee said, at page 230:

> "The language of the statute, respecting notice is too plain to be frittered away."

As the Tennessee Supreme Court itself pointed out in the *City of Knoxville* case (see Appendix D, Petitioner's Brief, p. 35), the Tennessee statute follows the pattern of similar statutes existing in most of the states and follows the pattern of the Federal statute (Miller Act) governing public works of the United States which contains a similar requirement of written notice.

Petitioner has stressed at length its quite unfounded claim that the provision of the Tennessee statute requiring suit to be brought promptly is "remedial". Both the Tennessee and New York Courts properly found against petitioner on this point.

However, in any event, it is, of course, obvious that no argument that the Tennessee statute is "remedial" can in any possible way be urged in connection with petitioner's failure to give written notice of its claim.

POINT III.

The Tennessee and New York decisions in the present case are entirely consistent with their respective prior decisions and the decisions of this Court.

(A)

The decision of the Tennessee Supreme Court in the *City of Knoxville* case is not as petitioner states at page 14 of its brief merely a holding that compliance with the Tennessee statute was a condition precedent to a suit in Tennessee.

While the action before the Tennessee Supreme Court was necessarily an action in a Tennessee court, the holding of the Tennessee Supreme Court was a statement of a general principle, *i. e.*, that the bond here involved was a statutory bond subject to the Tennessee statutory requirements of prompt notice of claim and commencement of action, compliance with which were conditions precedent to any recovery by a materialman upon the bond.

(B)

Petitioner is also mistaken in stating at pages 11 and 12 of its brief that the decision of the Tennessee Supreme Court in *Ben M. Hogan* v. *Walsh & Wells*, 177 S. W. (2) 835, is at variance with the decision of that Court in *City of Knoxville* v. *Burgess*, which was followed in the present case by the New York Court of Appeals.

The Tennessee Supreme Court in the *Hogan* case expressly distinguishes its decision in that case from its decision in the *City of Knoxville* case by pointing out the respective bonds involved in those cases differed, in that the bond in the *Hogan* case contained an express provision which gave to laborers and materialmen the right to sue "independently of said statutes".

Referring to its decision in the *City of Knoxville* case, and in two other similar earlier cases, the Tennessee Supreme Court said:

> "As to that part of the bond relating to the claims of laborers and furnishers of material, the condition of the bond is that the contractor 'shall assure and protect all laborers and furnishers of material on said work * * *, and also independently of said statutes.'
>
> In the three cases cited above the bonds were held to be statutory bonds because the conditions in the bonds were limited to the language of the statutes, and the furnishers of labor and materials had no right of action against the obligors except by virtue of the statutes. Here the language of the bond is broader and more comprehensive and exceeds the provisions of the statutes and refers to the statutes, 'and also independently of said statutes.'"

(C)

Nothing in the present case conflicts in the slightest degree with any holding of this Court in the case of *International Steel & Iron Co.* v. *National Surety Co.*, 297 U. S. 657, cited by petitioner. The partial quotation given at page 17 of petitioner's brief refers to an entirely different Tennessee statute and deals with facts completely dissimilar from anything involved in the present case.

Midstate Co. v. *Penna. R. Co.*, 320 U. S. 356, cited at page 16 of petitioner's brief, involved the validity of an agreement between an interstate rail carrier and a shipper, in terms extending the three year period within which the carrier could sue the shipper for freight charges. This Court by Mr. Justice Rutledge said:

> "The ultimate question is whether the action is brought in time under par. 16 (3) (a) of the Interstate Commerce Act." * * *

"We think petitioner's (shippers) position must be sustained. In short this is that the agreement is invalid as being contrary to the intent and effect of the section and the Act."

(D)

The present decision by the New York Court of Appeals neither "departs" from, nor produces the slightest confusion with, its prior decisions. In support of some alleged "departure", petitioner, p. 18 of its brief, refers to *Clark Plastering Co.* v. *Seaboard Surety Co.*, 259 N. Y. 424. This case was cited by the Court of Appeals in the opinion in the present case and does not conflict at all with the present decision. Moreover, the Court of Appeals, in construing the New Jersey materialmen's statute, held in *Walsh & McGee Steel Co.* v. *Fidelity & Deposit Company of Maryland*, 260 N. Y. 496, that the materialman had not substantially complied with the New Jersey statutory requirement that a written statement must be given within eighty days, and dismissed the complaint because of the failure by the materialman to comply with said statutory condition precedent.

(E)

No question of anti-trust law arises in this case where the contract is purely local in character.

The contract under which petitioner furnished the material was executed, delivered, and to be performed wholly within the State of Tennessee.

The bond here involved was executed, delivered and to be performed wholly within the State of Tennessee.

Petitioner's references to "national industry" and "national business" and its characterizing the petitioner as a "national business enterprise" are statements quite outside of the record and in any case establish nothing.

No question of enforcing national legislation arises in this case. It is a fact (as petitioner concedes at page 13 of its brief) that Congress has not legislated in any way with respect to local public works, like the present, so common among the States.

CONCLUSION.

The writ prayed for should be denied.

Respectfully submitted,

G. ARTHUR BLANCHET,
OSCAR R. HOUSTON,
ARTHUR W. CLEMENT,
Counsel for Respondent.